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No. 91-812

In The

Supreme Court of the United States

October Term, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP, PACIFIC TELEPHONE & TELEGRAPH COMPANY, PACIFIC TELESIS GROUP PENSION PLAN FOR SALARIED EMPLOYEES,

Petitioners,

v.

LANA PALLAS (aka Lana Hubbs), and persons similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF THE PETITIONERS

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MOTION OF THE CALIFORNIA EMPLOYMENT COUNCIL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rules 37.1 and 37.2 of the Rules of this Court, the California Employment Law Council ("CELC")

respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of petitioners in this case. The petitioners have consented, but we have been unable to contact counsel for the respondents to obtain consent to the filing of this brief. In support of this motion, CELC by the following shows that this brief brings to the attention of the Court the relevance and importance of this case beyond that presented in the petition.

1. CELC is a voluntary, nonprofit organization formed to promote the common interest of employers and the general public in sound principles of law pertaining to employment practices. CELC's membership consists of approximately 65 employers representing a broad segment of the employer community in California. CELC members employ well in excess of 500,000 California employees.

2. As California employers, CELC's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, et seq.), the California Fair Employment and Housing Act (Cal. Gov't Code § 12900, et seq.), and the other various federal and California statutes, orders and regulations pertaining to nondiscriminatory employment practices. CELC members are also subject to the provisions of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1101, et seq.).

3. Most of CELC's members have seniority-based programs or policies in which employment benefits and

rights are determined by the employee's length of service. Because all CELC members conduct business in California, all CELC members will be directly and permanently affected by the decision of the Ninth Circuit in this matter unless the petition for writ of certiorari is granted.

4. The CELC believes the petition for writ of certiorari should be granted. The Ninth Circuit's decision is contrary to this Court's holding in *United Airlines v. Evans*, 431 U.S. 553 (1977) which held that it is lawful to make current decisions that base employment benefits on a facially neutral seniority system, even if past acts of discrimination affect seniority credit. Under *Evans* and its progeny, employers are able to continue the long-standing and widely accepted use of seniority for determining employee rights and benefits, despite the fact that prior acts of discrimination may have diminished the seniority of employees in protected groups. By its misreading and misapplication of the principles contained in *Evans*, the Ninth Circuit undermines the use of seniority systems despite express Congressional sanction of their use in Title VII, and despite the widely held belief that seniority is a fair and appropriate way to determine employee benefits and rights.

5. The Ninth Circuit's opinion imposes a new and novel fiduciary duty on employers when they design ERISA plans. Despite the fact that Pacific Bell's plan violates no specific legal prohibitions contained in ERISA or arising out of any independent statutory obligations,

the Ninth Circuit's decision imposes an undefined obligation on employers independent of Title VII not to "discriminate" in the design of ERISA plans.

6. CELC filed a motion for leave to file a brief amicus curiae in the court below supporting Pacific Bell's petition for rehearing *en banc*. This motion was granted by order dated September 6, 1991.

7. Pacific Bell's petition was filed with this Court on November 18, 1991. Accordingly, CELC's brief, filed December 18, 1991, is timely under Rule 37.2 of this Court's Rules.

WHEREFORE, it is respectfully moved that CELC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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December 18, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – Continued

No. 91-812

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BRIEF AMICUS CURIAE OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF THE PETITIONERS

The California Employment Law Council ("CELC"), respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion.[1] The

[1] A letter from Pacific Bell's counsel consenting to the filing of CELC's brief has been filed with the Clerk of the Court.

brief supports the petition for a writ of certiorari filed in this case by Pacific Bell, and urges reversal of the decision below.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion for leave to file a brief as amicus curiae.

STATEMENT OF THE CASE

Respondent Lana Paflas has been employed by Pacific Bell and its predecessor, Pacific Telephone & Telegraph, since 1967. Respondent became pregnant and took a leave of absence in 1972. In accordance with Pacific Bell's practice at that time, this absence was counted as personal leave, rather than as disability leave. Employees on personal leave do not earn Net Credited Service during their absences (except for the first 30 days), whereas employees on disability leave accumulate Net Credited Service during their entire absence. Respondent's Net Credited Service Date was affected by this action.

Pacific Bell's determination that Respondent's 1972 absence due to pregnancy should not be treated as disability leave was lawful under the sex-discrimination provisions of Title VII of the Civil Rights Act of 1964 in effect at that time. In 1979, when the Pregnancy Discrimination Act ("PDA") (42 U.S.C. § 2000e(k)) amended Title VII to

require that pregnancy be treated as a disability, Pacific Bell began treating pregnancy leave as disability leave.

In 1987, the Company amended its retirement plan to provide for an early retirement option ("ERO") for which employees with 20 or more years of Net Credited Service were eligible. Respondent applied for the ERO benefit but was deemed ineligible due to her lack of Net Credited Service. Respondent alleges that she would have been eligible for the ERO if the Company had treated her 1972 absence from work due to pregnancy as a disability leave rather than as personal leave.

In her complaint, respondent alleges that reliance on Net Credited Service to determine her eligibility for ERO violated Title VII, the California Fair Employment and Housing Act ("FEHA"), and the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, et seq.) ("ERISA") because her Net Credited Service does not include the time she was absent in 1972 due to pregnancy.

The district court granted Pacific Bell's motion to dismiss the complaint. The court held that Pacific Bell's determination to base eligibility for ERO on service credit was facially neutral and, therefore, under this Court's decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), did not violate Title VII. Pet.App. at 19a. The district court also dismissed respondent's third cause of action under ERISA on the ground that ERISA does not provide an independent standard of fairness or discrimination that regulates an employer's design of an ERISA benefit plan. *Id.* at 22a.

The Ninth Circuit, in a 2-1 decision, reversed. The panel majority concluded that the district court erred in relying on *Evans* for two reasons: (1) because the ERO was instituted in 1987, plaintiff is not challenging the impact of a long-past act of discrimination but, instead, is challenging a current violation; and (2) the ERO is not facially neutral – it facially discriminates against pregnant women. Pet.App. at 5a-6a. The court concluded that by instituting the ERO in 1987, Pacific Bell "adopted, and thereby perpetuated, acts of discrimination which occurred prior to the enactment of the Pregnancy Discrimination Act." Pet.App. at 6a.

The majority also held that plaintiff had stated a cognizable claim under ERISA. The court stated that calculation of the service term for purposes of eligibility is subject to review for breach of fiduciary duty and that discrimination constitutes a breach of fiduciary duty. Pet.App. at 10a-11a.

In his dissent, Judge Dumbauld found that ERO did not violate Title VII, stating:

> "[A]ll the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress. Such current activity of the company * * * consists simply of examination of the company's records and adding up the time the employee has worked

for the company, as disclosed by those records. Neither we nor the telephone company can erase or change history. * * * Appellant's grievance is one that belongs to history; it is not a current violation of the law." Pet.App. at 10a-11a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision exposes employers to current liability for long past and closed incidents that have been incorporated into an employee's seniority if they choose to base current employment decisions on seniority. Its effect inevitably will be to deter the use of this common and accepted basis for making pay, benefits, lay-off and other employment decisions. This not only conflicts with this Court's decision in *United Airlines v. Evans*, 431 U.S. 553 (1977), but with section 703(h) of Title VII (42 U.S.C. § 2000e-2(h)) in which Congress explicitly provided that use of seniority systems for such purposes is lawful.

The Ninth Circuit's determination that Respondent states a claim under ERISA for discrimination is equally flawed. The Ninth Circuit's decision imposes an undefined obligation on employers not to "discriminate" in their plan design despite the fact that no provision in ERISA requires an employer to design plans in a manner which provides identical benefits to all employees.

For these reasons, we urge the Court to grant the petition for review in this case.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT, THE NINTH CIRCUIT'S OPINION MAKES IT UNLAWFUL TO USE A FACIALLY NEUTRAL SENIORITY SYSTEM FOR DETERMINING EMPLOYEE RIGHTS IF SENIORITY GIVES PRESENT EFFECT TO A LONG PAST ACT OF ALLEGED DISCRIMINATION.

A. The Ninth Circuit's Decision Will Undermine the Widely Accepted and Congressionally Sanctioned Use of Seniority.

If allowed to stand, the Ninth Circuit's decision will have immense practical consequences. It places at risk any employer who wishes to use seniority when determining new employee rights or benefits. That is because seniority, by its very nature, incorporates the results of all previous employment decisions that occurred during such employee's entire employment history.

The Ninth Circuit's reasoning extends to any past event subsequently made unlawful that resulted in a denial of employment continuity or affected seniority in a given position.[2] The Ninth Circuit's decision concludes

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[2] For example, if layoffs in a department were based on seniority in the department, and a department employee claims that years earlier he was repeatedly denied a transfer to the department because of what is later held to be race

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that the use of seniority is valid only if every past employment decision affecting seniority is also valid, and that those decisions must be judged by today's standards, not the laws in effect at the time. Thus, the Ninth Circuit's reasoning gives retroactive effect, through seniority recalculations, to extensions of civil rights protections to newly covered employees or newly protected groups. *See, e.g.*, Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103 (extending Title VII to state and local government and education institutions) and Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (extending protections to individuals with disabilities).

As a result, in implementing new pay, benefits and layoff programs, employers not willing to risk renewed liability for alleged past acts (or as in this case, liability for acts which were lawful when taken but are now prohibited) will be forced to either (1) attempt to recalculate each employee's seniority to ensure that no past act of arguably unlawful discrimination that occurred at any time during the course of an employee's entire employment history has affected the seniority calculation, or (2) forgo using seniority as a basis for determining eligibility or rights under new employee benefit or layoff programs.

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discrimination, that employee may be able to state a claim under the Ninth Circuit's decision. The employer would then have to review each transfer decision affecting the employee to determine if he was affected by long past acts of discrimination and alter the employee's seniority accordingly. If the dates that the transfer should have taken place are now unknown, it would be impossible accurately to assess seniority.

The first alternative will, in most cases, be impossible. Employers would have to guess what actions could have given rise to claims of discrimination. Even if they could pin point arguably unlawful past decisions, the company's records will frequently not contain adequate information to determine when such decisions occurred or which employees may have been affected.[3] In those rare cases when recalculations could be accomplished, they could result in many employees *not* receiving the benefits, rights and protections they legitimately expect by virtue of long-standing seniority calculations because they are displaced due to revised calculations. For example, an employee may justifiably believe that he or she is protected from layoff due to his or her seniority status and thus forgo other employment opportunities, only to find that he or she is now at risk because his or her employer has recalculated seniority credit.

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[3] For example, in this case, the employer's records may simply indicate that an employee was on "personal leave" and not give any indication whether the leave was related to pregnancy disability.

The Ninth Circuit's decision, if allowed to stand, will have a dramatic effect on record retention policies of employers. Currently, for the purposes of Title VII, employers generally are obligated to maintain employee records for only one year from the date of making the record or from the personnel action involved. 56 Fed.Reg. 35753 (effective Aug. 26, 1991). If the Ninth Circuit's decision is allowed to stand, California employers who wish to use seniority to determine employee benefits or rights, will need to retain records until the death of the current or former employee if they wish to justify seniority determinations.

Unions, which traditionally rely on seniority to determine rights and benefits, will also be adversely affected by the Ninth Circuit's decision. This decision could unsettle labor-management relations by provoking arbitration or litigation over issues previously handled routinely by reference to seniority rosters and cause employers to resist using seniority for determining future entitlements.

As a result of the enormous practical problems in recalculating seniority every time a new pay or benefits decision is made, the second alternative, that of forgoing the accepted and pervasive use of seniority in making employment decisions, is the most probable result of the Ninth Circuit's decision. This will not only hamper employers' ability to determine eligibility for new benefits or rights under layoff programs, it will also make employers reluctant to grant benefits such as early retirement options that would otherwise be granted to long-term employees due to their loyal service. Despite a widely held belief that seniority is the most fair and appropriate way of determining employee rights and benefits, this decision, if allowed to stand, will make it too risky for employers to continue rewarding employees for their long-term loyal service.

Finally, the Ninth Circuit's decision, if allowed to stand, will undermine Congress' clearly stated intent to encourage the use of seniority systems.[4] Section 703(h) of

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[4] Section 112 of the Civil Rights Act of 1991 amends section 706(e) of the Civil Rights Act of 1964 to overrule the holding of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900

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Title VII (42 U.S.C. § 2000e-2(h)) states that: "it shall *not* be an unlawful employment practice" to base terms and conditions of employment on a bona fide seniority system. In making this express provision for the continued use of seniority systems in reaching current benefits decisions, Congress was keenly aware of the previous use of such systems, and of the impairment of legitimate employee expectations that would result if use of such systems to determine current benefits were to expose an employer to liability, as the Ninth Circuit's decision in the present case does.[5]

B. The Ninth Circuit's Decision Misconstrues This Court's Decision in *United Airlines v. Evans.*

In *Evans*, plaintiff was forced to resign when she married. This forced resignation the Court found might well have been unlawful if challenged in a timely manner. Under the employer's seniority system, resigning

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(1989), permitting subsequent challenges to a seniority system that has been adopted for an "intentionally discriminatory purpose." Section 112 makes no changes to section 703(h) and does not disturb *Evans* and other decisions of this Court which do not involve intentionally discriminatory seniority systems. *See* 137 Cong.Rec. S15477 (daily ed. Oct. 30, 1991) (statement of Senator Dole).

[5] For this reason, the Ninth Circuit's reliance on *Bazemore v. Friday*, 478 U.S. 385 (1986) is misplaced. *Bazemore* did not involve a seniority system giving some current effect to a previous decision. It instead involved a discriminatory practice which had its inception prior to the Act but had continued into the present and thus was a *current* act of discrimination. In contrast, in the present matter, the company is merely applying a bona fide facially neutral seniority system which has been specifically authorized by Congress.

employees lost all seniority. Several years later, plaintiff was rehired but received no seniority credit for her earlier service. Denial of seniority credit had an adverse effect on her current pay and fringe benefits.

Although the Court found that the seniority system gave "present effect to a past act of discrimination" (431 U.S. at 558), the Court held that there was no present violation of the statute:

> "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id.* at 560.

As in *Evans,* respondents in this action challenge the employer's early retirement program because a past event of no present legal significance – the classification of pregnancy disability leave as "personal leave" in 1972 – has affected the calculation of seniority credit which is the basis for determining current eligibility for an early retirement program. Under *Evans,* even if the classification system used by the employer prior to 1979 was unlawful,[6] no current violation of Title VII has occurred merely because the classification has a continuing effect on Respondents' seniority-based benefits.

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[6] In fact, the classification system at issue here was *not* unlawful at the time it was in effect because, prior to the Pregnancy Discrimination Act amendment to Title VII, employers were not required to treat pregnant women like temporarily disabled men. *See General Electric Co. v. Gilbert,* 429 U.S. 125 (1976).

The Ninth Circuit attempts to distinguish *Evans* on two grounds: (1) Pacific Bell's Early Retirement Option was adopted in 1987 and thus Respondents had brought a timely challenge to this new benefit program; and (2) the seniority system used to determine eligibility for the program facially discriminates against pregnant women. Both of these attempts to distinguish *Evans* are based on a misconstruction of *Evans* and its progeny and a misstatement of the record.

Respondents' claim that their charge is timely because they are challenging a benefit program established in 1987 is based on a faulty analysis of *Evans*. In *Evans*, the plaintiff likewise had filed a timely claim; nevertheless this Court found the relevant inquiry to be whether the "employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to [her rehire]." 431 U.S. at 554. This Court held that failure to give plaintiff seniority credit, even though her 1968 "resignation" may well have been unlawful, did not establish a current violation of the Act despite the fact that plaintiff's current salary and benefits were diminished due to lack of seniority. Similarly, it is not a current act of discrimination for an employer to rely on a facially neutral seniority system for determining eligibility for a newly established benefit program even if the net service credit used to determine seniority is affected by the 1972 action of classifying absence as personal leave. *Accord Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"). Thus, the fact that the

Respondents' attack against the 1987 benefit plan is timely is of no moment because the plan does not violate Title VII.[7]

The Ninth Circuit's assertion that the "net credit system used to calculate eligibility under the ERO is not facially neutral" but "discrimates against pregnant women" disregards precedent and defies logic. Clearly, the system relies on seniority. The eligibility criteria do not refer to pregnancy. It is true that prior to 1979 pregnancy disability leaves were deemed "personal leaves" and that plaintiff's long-established seniority date incorporates the 1972 application of this pre-1979 policy. However, these facts do not make the seniority system discriminatory "on its face." Only where a plan contains a discriminatory term in its text has this Court found "facial discrimination." *See, e.g., Automobile Workers v. Johnson Controls, Inc.*, 111 S.Ct. 1196, 113 L. Ed. 2d 158 (1991) (policy excluding "women who are pregnant or who are capable of having children" is facially discriminatory). *See Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765, 768 (8th Cir. 1978) (salary scale based on annual years of service sex neutral even though women

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[7] *See Schwabenbauer v. Bd. of Educ. of City of Olean*, 777 F.2d 837 (2d Cir. 1985) (rejecting claim that plaintiff's 1972 dismissal constituted current violation since she would have had enough service to receive tenure but for employer's failure to credit her 1970 maternity leave); *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (rejecting claim that employer's current salary schedule, which was based on seniority, violated Title VII since employee's mandatory maternity leave absences were not credited).

taking pre-1972 maternity leaves were not granted service credit for the year of their maternity leave).

The panel appears to argue that the seniority system is facially discriminatory because it has "adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act." Pet.App. at 6a. This, however, is the exact argument rejected in *Evans*. In that case this Court held that the seniority plan was "neutral in its operation" despite the fact that it gave present effect to a previous act of discrimination. 431 U.S. at 558.

II. CONTRARY TO WELL ESTABLISHED LAW, THE NINTH CIRCUIT STATES THAT BENEFIT PLAN DESIGNS MAY BE CHALLENGED EVEN IF THEY DO NOT VIOLATE SPECIFIC PROHIBITIONS IN ERISA OR INDEPENDENT STATUTORY OBLIGATIONS.

The Ninth Circuit's decision that appellants state a claim under ERISA for discrimination in breach of the employer's fiduciary duty disregards the established principle that, aside from the specific legal prohibitions contained in ERISA or arising out of independent statutory obligations, the courts are not authorized to scrutinize the appropriateness of the design of a single-employer benefit plan. Numerous cases in other circuits have held that in the case of a single-employer plan, a

company does not act as a fiduciary when it establishes, amends, terminates or designs a benefit plan.[8]

ERISA plans may be challenged on the ground that they violate some independent statutory obligation, such as Title VII. However, no provision of ERISA gives the courts the right to set an independent standard of "fairness" or to challenge the plan's design due to "discrimination" not prohibited by independent statutory obligations. No ERISA provision "requires an employer to provide identical benefits to employees when the employer designs a plan." *Trenton, supra,* 832 F.2d at 809

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[8] *See, e.g., Musto v. American General Corp.,* 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied,* 490 U.S. 1020 (1989) (great difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be; a company acts as a fiduciary in performing the first task, but not the second.); *Amato v. Western Union International, Inc.,* 773 F.2d 1402, 1416-1417 (2d Cir. 1985), *quoting Amato v. Western Union Intern., Inc.,* 596 F.Supp. 963, 968 (S.D.N.Y. 1984) (Employers "assume fiduciary status only when and to the extent they" function in their capacity as plan administrators – not when they design their pension plans and act as a corporate employer). *Accord, Trenton v. Scott Paper Co.,* 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied,* 485 U.S. 1022 (1988) (court rejected plaintiff's claim that retirement board breached its fiduciary duties in adopting and implementing an early retirement option which benefitted some employees and not others since the plan design was purely a corporate management decision).

(court adopting employer's analysis). As explained in *Moore v. Reynold Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985):

> "In enacting ERISA, Congress continued its reliance on action by employers * * * . *Neither Congress nor the courts are involved in the decision to establish a plan or in the decision concerning which benefits a plan should provide.* In particular, *courts have no authority to decide which benefits employers must confer upon their employees;* these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation. Absent a violation of federal or state law, *a federal court may not modify a substantive provision of a pension plan.*" (Citations omitted emphasis added.)

Moreover, ERISA itself does not contain any substantive prohibition against sex discrimination. Congress considered and explicitly rejected an amendment to include in ERISA substantive prohibition of sex discrimination, choosing to rely on Title VII as the source of substantive law in this area. 119 Cong.Rec. 24456-57, 30410 (1973). Thus, an ERISA plan can only be deemed an unlawful act of discrimination on the basis of sex if it violates Title VII – something the plan at issue does not do.

The Ninth Circuit's reliance on *Elser v. I.A.M. Nat. Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983) is misplaced because *Elser* involved the administration of a *multi-employer* plan. As the *Musto* court explained, there is an important distinction between reviewing the terms of a *multi-employer* pension plan for the general fairness of its "allocation" of benefits and reviewing the terms of a *single-employer* plan:

> "In amending a *multi-employer* plan, where the level of contributions of each participating employer has generally been set by collective bargaining the trustees 'affect the allocation of a finite plan asset pool between participants,' as defendants point out in their brief, *and hence act as plan administrators subject to a fiduciary duty.* But when, as here, there is only one employer, there is normally no 'plan asset pool' to be affected. *In amending a single employer plan, therefore, the company normally acts in its role as employer, not in its role as fiduciary.*" 861 F.2d at 912 (second and third emphasis added).

The Ninth Circuit's determination that the design and allocation of benefits under a single-employer ERISA benefit plan is subject to a *fiduciary* standard of review and thus subject to challenge for "discrimination" on a basis *not* made unlawful by some independent statutory obligations or specific provision of ERISA, is contrary to well-settled law. This unprecedented and undefined standard of review will create confusion among the lower courts. Moreover, this newly imposed standard of review will be a deterrent on employers' willingness to create and fund purely voluntary benefit plans for their employees.

CONCLUSION

For the foregoing reasons, Amicus Curiae California Employment Law Council urges the Court to grant Pacific Bell's petition for writ of certiorari.

Respectfully submitted,

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